Supreme Court, U.S.
FILED
OCT 11 1995
CLERK

No. 95-379

In The

Supreme Court of the United States

October Term, 1995

JASON NEWKIRK, by Next Friends, Daniel Newkirk and Nancy Newkirk; DANIEL NEWKIRK; NANCY NEWKIRK,

Petitioners,

vs.

MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LISA L. SWEM
Counsel of Record
DONALD J. BONATO
THRUN, MAATSCH AND NORDBERG, P.C.
Attorneys for Respondent
501 South Capitol Avenue - Suite 500
Lansing, Michigan 48933
(517) 484-8000

October 11, 1995

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to grant certiorari where Petitioners have failed to: raise any important constitutional issue not previously decided by this Court, identify any conflict among the Circuit Courts regarding an issue germane to this case, appeal any statutory cause of action, or establish that the lower courts erred in their decisions; and where Respondent is entitled to qualified immunity.

II. Whether the constitutional right of privacy extends to the daily operations of schools to require educators to obtain informed written consent from the student's parents before meeting with the student pursuant to a teacher referral.

LIST OF PARTIES

Petitioners Jason Newkirk, Daniel Newkirk and Nancy Newkirk are individuals.

Respondent Michael Fink is an individual. He is being sued in both his individual capacity and in his official capacity as a guidance counselor in the East Lansing Public Schools, East Lansing, Michigan.

The following were also parties to the proceedings in the United States District Court for the Western District of Michigan and in the Ingham County Circuit Court for the State of Michigan: the East Lansing Public Schools; Dr. William Mitchell, individually and in his official capacity as the superintendent of the East Lansing Public Schools; Sally McClintock, individually and in her official capacity as the principal of the Whitehills Elementary School; Jackie Killingsworth, individually and in her official capacity as a classroom teacher at the Whitehills Elementary School; Ann Bloomquist, individually and in her official capacity as a music teacher at the Whitehills Elementary School; Creative Therapeutics, Inc., a New Jersey corporation; and Dr. Richard Gardner, individually.[1]

Petitioners incorrectly assert that the East Lansing Public Schools and its superintendent, principal and teachers were parties to the proceedings in the United States Court of Appeals for the Sixth Circuit. *Pet.* at ii.[2] These parties were dismissed pursuant to stipulation and order during the District Court

---

1. Dr. Gardner developed "*The Talking, Feeling and Doing Game*," which is produced and sold by Creative Therapeutics, Inc.

2. The following abbreviations designate the following pleadings/records: *Compl.* - Complaint; *Pet.* - Petition; *Pet., App.* - Appendix to Petition; *Resp., App.* - Respondent's Appendix; *R.* - Record on Appeal.

proceedings. *Pet., App.* D. Mr. Fink was the only defendant-appellee in the appeal to the United States Court of Appeals for the Sixth Circuit. *See Pet., App.* at E-2 ("plaintiffs appeal the judgment on the right-to-privacy count as to the guidance counselor only").

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented i

List of Parties ii

Table of Contents iv

Table of Citations v

Opinions Below 2

Statement of Jurisdiction 4

Constitutional and Statutory Provisions Involved 4

Counter-Statement of the Case 5

Summary of the Argument 7

Reasons for Denying the Writ 8

I. Petitioners Have Not Identified Any Legitimate Basis for this Court to Exercise Its Discretion to Grant Certiorari. 8

A. This Case Does Not Involve an Important or Unresolved Constitutional Issue. 9

B. No Conflict with the Circuit Courts Have Been Identified. 11

Contents

	Page
C. No Cause of Action Based on Federal or State Statutory Provisions Has Been Pled, Appealed, or Identified as Conflicting with the Constitution.	12
D. Respondent Is Entitled to Qualified Immunity.	13
II. The Decisions of the Lower Courts Are Not Erroneous.	14
A. Tort Allegations Should Not Be Constitutionalized.	15
B. Federal Courts Should Not Interfere with the Operations of the Public Schools.	16
C. The Constitution Should Be Interpreted with Common Sense.	18
Conclusion	21

TABLE OF CITATIONS

Cases Cited:

Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354 (D. Or. 1992)	15
Anderson v. Creighton, 483 U.S. 635 (1987)	14

Contents

Page

Arnold v. Board of Educ., 880 F.2d 305 (11th Cir. 1989) .. 11, 12

Bahr v. Jenkins, 539 F. Supp. 483 (E.D. Ky. 1982) 18

Baker v. McCollan, 443 U.S. 137 (1979) 16

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) .. 9

Collins v. Harker Heights, 503 U.S. 115 (1992) 16

Daniels v. Williams, 474 U.S. 327 (1986) 16

Davis v. Scherer, 468 U.S. 183 (1984) 14

Epperson v. Arkansas, 393 U.S. 97 (1968) 17

Goss v. Lopez, 419 U.S. 565 (1975) 20

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14

Ingraham v. Wright, 430 U.S. 651 (1977) 16

Meyer v. Nebraska, 262 U.S. 390 (1923) 10

Milliken v. Bradley, 418 U.S. 717 (1974) 16, 17

Mitchell v. Forsyth, 472 U.S. 511 (1985) 14

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 11

New Jersey v. T.L.O., 469 U.S. 325 (1985) 9, 10, 17

Contents

	Page
Parham v. J.R., 442 U.S. 584 (1979)	10
Paul v. Davis, 424 U.S. 693 (1976)	16
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	10
Prince v. Massachusetts, 321 U.S. 158 (1994)	11
Santosky v. Kramer, 455 U.S. 745 (1982)	10
Stanley v. Illinois, 405 U.S. 645 (1972)	10
Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969)	17
Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995)	9, 10, 15, 20
Wood v. Strickland, 420 U.S. 308 (1975)	18
Statutes Cited:	
20 U.S.C. § 1232h	2, 13
28 U.S.C. § 1254(1)	4
42 U.S.C. § 1983	4, 16
Mich. Comp. Laws Ann. § 330.1750 (West 1992)	19
Mich. Comp. Laws Ann. § 600.2165 (West 1989)	19

Contents

Page

United States Constitution Cited:

Art. I, § 9, cl. 3 4

First Amendment 3, 4

Fourth Amendment 4

Fifth Amendment 4

Ninth Amendment 4

Fourteenth Amendment 4, 16

Other Authorities Cited:

Candace Purdom, *Road Trip Ahead? Games Bring Boredom to a Screeching Halt,* Chi. Trib., August 3, 1993, § C at 5 20

Gregory Stock, *The Kids' Book of Questions* 6, 20

APPENDIX

Appendix A — Referral to Child Guidance Consultant Dated November 3, 1989 ..... 1a

Appendix B — Stipulation and Order Filed March 28, 1994 ..... 2a

Appendix C — Final Judgment and Order Dated December 13, 1994 ..... 6a

Contents

Page

Appendix D — Constitutional and Statutory Provisions Involved 9a

No. 95-379

In The

Supreme Court of the United States

October Term, 1995

JASON NEWKIRK, by Next Friends, Daniel Newkirk and Nancy Newkirk, DANIEL NEWKIRK; NANCY NEWKIRK,

Petitioners,

vs.

MICHAEL FINK, individually and in his official capacity as Counselor of East Lansing Public Schools,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael Fink, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Jason Newkirk, Nancy Newkirk, and Daniel Newkirk.

OPINIONS BELOW

On July 8, 1991, Petitioners brought suit in the United States District Court for the Western District of Michigan against the East Lansing Public Schools, William Mitchell (superintendent), Sally McClintock (principal), Jackie Killingsworth (classroom teacher), Ann Bloomquist (music teacher), and Michael Fink (guidance counselor). Count I of the complaint alleged a violation of Petitioners' constitutional right to privacy. Count II alleged a violation of the Protection of Pupil Rights Amendment ("P.P.R.A."), 20 U.S.C. § 1232h. Counts III through VII alleged various pendant state law claims, which were dismissed by the District Court three weeks after the complaint was filed. *Pet., App. F.*

Petitioners subsequently refiled the following claims in the Ingham County (Michigan) Circuit Court: (1) violation of the right to privacy under the Michigan Constitution, (2) tortious invasion of privacy, (3) intentional infliction of emotional distress, (4) medical malpractice, (5) negligence, and (6) products liability. *Ingham County Circuit Court No. 92-72034-AZ.* Extensive discovery took place in the state case, including the depositions of the parties (seven), lay witnesses (nine), and expert witnesses (seven). In the midst of discovery, but prior to the filing of dispositive motions, all defendants except Respondent were dismissed pursuant to stipulation and order. No attendant settlement documents were filed. Following discovery, the state court dismissed Petitioners' remaining claims and entered final judgment in Respondent's behalf. *Resp., App. A.* Petitioners did not exercise their appeal of right from final judgment in the state case, and the deadline for appeal has expired.

On March 31, 1993, the District Court granted partial summary judgment for all defendants, dismissing Count I of the

complaint (constitutional privacy right). *Pet., App. A.* Nearly two years after filing their complaint and almost four months after summary judgment on the privacy claim, Petitioners sought leave to amend their complaint to expand the constitutional privacy claim brought in the original complaint to a "due process and constitutional right of privacy" claim, and to add a claim for violation of parental liberty and First Amendment free exercise rights. *R.* 649. The District Court denied Petitioners' motion to amend. *Pet., App. H.*

The District Court later dismissed Count II of the complaint (violation of the P.P.R.A.). *Pet., App. B.* Petitioners then filed a motion to alter or amend judgment, which was denied for Count I (privacy) and granted for Count II (P.P.R.A.). *Pet., App. C.* However, by stipulation and order filed on March 28, 1994, the District Court dismissed Count II (P.P.R.A.) as to all parties. Petitioners also stipulated to dismiss from the federal litigation all defendants, except Respondent. *Pet., App. D.* No attendant settlement documents were filed.

This litigation was *not* brought solely "against the school district and counselor," but also against the school superintendent, principal, classroom teacher, music teacher, Creative Therapeutics, Inc., and Dr. Richard Gardner. *Compare Pet.* at 4 *with Pet.* at ii. Contrary to Petitioners' assertion, the District Court did *not* hold that there was no constitutional violation of parental rights to "even see the records." *Compare Pet.* at 4 *with Pet., App. B.* No cause of action was ever pled relative to Petitioners' records request.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit *only* as to Respondent. Although the appeal was untimely, the District Court granted Petitioners' motion to extend time for filing notice of appeal. The Sixth Circuit affirmed

the District Court's rulings, without opinion, as to the grant of summary judgment on the privacy count and the denial of the motion to amend complaint. *Pet., App. E.*

STATEMENT OF JURISDICTION

The jurisdiction of this Court for review by Petition for Writ of Certiorari is invoked under 28 U.S.C. § 1254(1). Petitioners seek review of a decision made by the Sixth Circuit Court of Appeals on June 13, 1995, which affirmed the District Court's grant of summary judgment in favor of Respondent regarding Petitioners' constitutional privacy claim. Because Petitioners have not asked this Court to review the District Court's denial of their motion to amend complaint, this Court does not have jurisdiction over Petitioners' "due process" and "parental liberty" claims which were presented in the proposed amended complaint. *R.* 694.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As pled in their complaint, Petitioners' privacy claim is based on the constitutional and statutory provisions listed below and fully set forth in Respondent's Appendix D.

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 3.

U.S. Const. amends. I, IV, V, IX, and XIV.

Statutory Provisions

42 U.S.C. § 1983.

COUNTER-STATEMENT OF THE CASE

In October 1989, Jason Newkirk's teacher, Mrs. Killingsworth, contacted Nancy Newkirk to discuss concerns about Jason. Mrs. Killingsworth recommended that Jason see Mr. Fink, the school guidance counselor. *Compl.*, ¶ 18. Mrs. Killingsworth was concerned because Jason had been found playing with matches and was having difficulty socializing with other children. *Compl.*, ¶ 23. During this discussion, Mrs. Newkirk told Mrs. Killingsworth that Jason could see Mr. Fink to "play games." *Compl.*, ¶ 20. Petitioners have neither alleged nor produced evidentiary support that Mr. Fink heard from either Mrs. Newkirk or Mrs. Killingsworth about any "conditions" for seeing Jason. *See contra Pet., 3.*

Shortly after her discussion with Jason's mother, Mrs. Killingsworth completed a "*Referral to Child Guidance Consultant*" form. *Compl.*, ¶ 21; *Resp., App. C.* This form is dated November 3, 1989, and states, in pertinent part:

> Jason is an angry child. He needs to talk, identify his anger and how to talk about his feelings and concerns. Jason needs a good friend. Example: If he has a good day. What made it go well —

Resp., App. C. With Mrs. Newkirk's knowledge, Mr. Fink met with Jason pursuant to Mrs. Killingsworth's referral.

Later that month, Mr. Fink talked with Daniel Newkirk about Jason's school difficulties. Petitioners allege that Mr. Newkirk "expressly forbade Mr. Fink to counsel Jason." *Compl.*, ¶ 25.[3]

---

3. The District Court noted "It is, at best, a debatable issue whether Mr. & Mrs. Newkirk did not consent to counseling. However, for purposes of this [summary judgment] motion, I assumed they did not consent." *Pet., App.* at A-13, n.6.

Mr. Fink nonetheless understood Mr. Newkirk's response to permit him to meet with Jason. Pursuant to the teacher's referral, Mr. Fink met with Jason once a week to play checkers, pick-up sticks, the "Operation" game, and indoor basketball and soccer. Mr. Fink twice played "*The Talking, Feeling and Doing Game*" for no longer than 15 minutes and once read from *The Kids' Book of Questions*.

Petitioners have no basis to claim that they became aware of Mr. Fink's meetings with Jason only "after several months" and after they had "demanded to know what was happening at school." *Pet.* at 3. Petitioners acknowledge that Mrs. Newkirk had told Mrs. Killingsworth that Jason could meet with Mr. Fink "to play games." *Compare Pet.* at 3 *with Compl.*, ¶ 20. There is neither an allegation nor evidentiary support that Petitioners "on several occasions" during the school year made inquiries to Mr. Fink or "demanded to know what was happening at school." *Pet.* at 3.

Similarly, there is no evidence that Mr. Fink either refused to cooperate with Petitioners' "orders" not to continue meeting with Jason or disregarded their request for Jason's school records. *Pet.* at 4. Petitioners removed Jason from school in the midst of the following school year because the *principal* denied their request to have Jason exempt from the "conflicts resolution" curriculum utilized in his social studies class. *Pet., App.* at A-3 and A-17; *Compl.*, ¶ 41 (Jason "was subsequently removed . . . due to the *school's* refusal to exempt him . . .") (emphasis added). However, both the principal and the school district were dismissed from this litigation pursuant to Petitioners' stipulation.

Petitioners' characterization of *The Talking, Feeling, and Doing Game* as a "treatment tool to be used only by trained psychiatric professionals" contradicts the game's statement indicating that it is to be used by "mental health professionals."

Compare Pet. at 3 with *Pet.* at 11. Acknowledging that Respondent is a social worker, as well as a school guidance counselor, Petitioners erroneously assert that Respondent is not a "mental health professional" because he is not a psychiatrist. *Pet.* at 11.

Petitioners' Statement of the Case includes misrepresentations for which there is neither support in the federal court record nor contradictory evidence developed through discovery in the companion state law case. For example, the federal court record contains no support for the assertion that Jason was a "normal, quiet little boy." *Pet.* at 3. Testimony of school officials and expert witnesses in the state court case supports the opposite conclusion. Petitioners' complaint also demonstrates that Jason's third grade teacher did *not* worry that Jason was "too quiet," but rather expressed concerns about Jason's playing with matches and his lack of socialization skills. *Compl.*, ¶ 23; *see also Resp., App. C.* (Jason is an "angry child.")

Petitioners place great reliance on the affidavit of their expert witness, Dr. William A. Decker. *Pet.* at 15-16. Dr. Decker's opinion is far from uncontradicted and remains a legal conclusion, not "fact." Dr. Decker's affidavit was submitted to the District Court nearly five months after entry of summary judgment. The District Court noted that Petitioners were "simply trying to reargue positions that this Court rejected or are attempting new arguments that should have been raised earlier." *Pet., App.* at C-3. Dr. Decker's "opinions" were also submitted to the state court, which nonetheless dismissed Petitioners' claims against Respondent. *Resp., App. A.*

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for this Court's exercise of discretionary jurisdiction because it does not involve an important or unresolved constitutional issue, nor does it

conflict with rulings of the Circuit Courts. Petitioners' federal statutory claim was dismissed pursuant to stipulation and order, and was never appealed. The asserted conflict with state statutory provisions has neither been pled nor appealed. Respondent is also entitled to qualified immunity.

The decisions of the lower courts are not erroneous. The District Court declined to constitutionalize a tort case. Relying on this Court's long-standing reluctance to interfere with the operations of the public schools, the District Court identified "common sense" reasons why it should not recognize Petitioners' claim as a fundamental right protected by the Constitution. The Sixth Circuit affirmed this decision without opinion.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE NOT IDENTIFIED ANY LEGITIMATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI.

Petitioners fail to satisfy the criteria traditionally applied by this Court in determining whether to grant certiorari. This case involves no important or unresolved constitutional issue. Petitioners have not demonstrated that the unpublished decisions of the lower courts are inconsistent with decisions of this Court, nor have Petitioners identified any conflict among the Circuit Courts regarding the issue involved in this case — Petitioners' right to privacy. The asserted "conflict" with federal and state statutes is not before this Court.

The facts in this litigation are sufficiently unique so that the precedential value in the unpublished decisions of the District Court and Sixth Circuit is likely to be minimal. The issue

presented by Petitioners has arisen only once and has no impact beyond the immediate parties. Because Respondent is entitled to qualified immunity, further discovery or a trial on the merits is precluded.

A. This Case Does Not Involve an Important or Unresolved Constitutional Issue.

The District Court acknowledged the unusual circumstances of Petitioners' cause of action:

> Both parties agree that no court has ever recognized a right to privacy in a factual situation similar to the case before the Court. This, of course, does not mean that no such right exists. Instead, the Court must look to analogous situations in order to determine if a right to privacy exists here.

Pet., App. at A-5. In its effort to "determin[e] the scope of the constitutionally protected right to privacy," the District Court carefully considered the cases cited by Petitioners. *Pet., App.* at A-5 to A-7. However, noting this Court's posture in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) and *New Jersey v. T.L.O.*, 469 U.S. 325, 342, n.8 (1985), the District Court observed that "when dealing with the rights of students, courts have been less willing to find a broad right of privacy." *Pet., App.* at A-7. The District Court then analyzed Petitioners' claim in light of decisions from this Court and other federal courts relative to student rights in the school. *Pet.*, at A-7 to A-12.

The District Court's observations were reinforced last term by this Court in *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995). Examining the constitutional privacy interest of a junior high school student who declined to submit to random urinalysis

testing as a condition of his participation in school sports, this Court held that the Constitution "does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" *Id.* at 2391 (*citing New Jersey v. T.L.O.*, 469 U.S. at 338). Finding that certain privacy expectations vary with context, this Court recognized the special circumstances innate to our Nation's public schools and held that "while children assuredly do not shed their constitutional rights . . . at the schoolhouse gate, . . . the nature of those rights is what is appropriate for children in school." *Vernonia*, 115 S. Ct. at 2391-92 (citations omitted). Moreover, " 'students within the school environment have a lesser expectation of privacy than members of the population generally.' " *Vernonia*, 115 S. Ct. at 2392 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)).

This Court's decisions regarding a familial right to privacy, relied on by Petitioners, are restricted to circumstances in which due process considerations were triggered by state proceedings which irrevocably severed the relationship between parent and child: *Santosky v. Kramer*, 455 U.S. 745 (1982);[4] statutorily presumed that unwed fathers are neglectful, *Stanley v. Illinois*, 405 U.S. 645 (1972); or interfered with a parental decision to commit a child to state mental health facilities, *Parham v. J.R.*, 442 U.S. 584 (1979).

Petitioners also rely on cases which address a statute or local ordinance imposing criminal sanctions: finding unconstitutional a statute that prohibited teaching any foreign language beyond the eighth grade, *Meyer v. Nebraska*, 262 U.S. 390 (1923); finding unconstitutional a statute which imposed a criminal penalty on a parent for not sending a school-age child to school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);[5] upholding the

---

4. Petitioners miscite *Santosky*, *supra*, as 455 U.S. 743. *Pet.* at 8.

5. The cited language in *Pierce*, *supra*, relied upon by Petitioners is at 534-35. *Pet.* at 8.

conviction under a state child labor law of a woman who allowed her young niece to sell religious tracts on public sidewalks, *Prince v. Massachusetts*, 321 U.S. 158 (1944); and finding unconstitutional a housing ordinance which limited occupancy to members of a single family, *Moore v. City of East Cleveland*,[6] 431 U.S. 494 (1977).

Despite the dicta in those cases regarding parental prerogatives in child rearing, this Court noted that the rights of parents or the family are not beyond limitation or regulation. *See, e.g., Prince*, 321 U.S. at 166; *Moore*, 431 U.S. at 499. These are constitutionally significant distinctions, explicitly recognized by the Courts that authored those opinions. They do not provide a basis for this Court to require, as a matter of constitutional law, that a school official first obtain "written, full, and informed consent" from parents or guardians before meeting with a student. *Pet.* at 11.

B. No Conflict with the Circuit Courts Has Been Identified.

Without citation, Petitioners assert that "[d]ecisions of courts in all circuits, including the Sixth Circuit, are in conflict with the decision in the instant case." *Pet.* at 5. However, it is clear that no such intra-circuit or inter-circuit conflicts exist. The Sixth Circuit affirmed the District Court's decision in this case and found no conflict within the Sixth Circuit. *Pet., App. E.* Petitioners' perceived intra-circuit conflict was never raised through a request for re-hearing or hearing *en banc*.

The only Circuit Court case cited in the Petition is *Arnold v. Board of Educ.*, 880 F.2d 305 (11th Cir. 1989), upon which the District Court relied to support its decision to dismiss Petitioners' privacy claim. *Pet., App.* at A-14 to A-15. Petitioners attempt to

---

6. Petitioners erroneously refer to this case as "*City of Cleveland*." *Pet.* at 6.

distinguish *Arnold* from the present case based on the age differences of the children involved and on the alleged "coercion" used so Jason Newkirk would not inform his parents about the counseling. *Id.* at A-15. Legal distinctions relative to age level are generally set by the legislative branches of government. As for the alleged " coercion," the District Court found:

> Here, there is no such "coercion" claim, nor is there any evidence that defendants "coerced" Jason into counseling sessions with Mr. Fink. Plaintiffs allege, without any evidentiary support, that Mr. Fink said to Jason, "do not tell your parents," presumably about the counseling sessions. I do not believe that this unsupported factual statement, if true, rises to the level of "coercion" under *Arnold*, *supra*.

Pet., App. at A-14, n.9. The fact that Petitioners disagree with the District Court's conclusion does not create a conflict among the Circuit Courts, particularly when only one Circuit Court case has been cited. Petitioners have not established the existence of an inter-Circuit conflict, nor the importance of resolving this illusory conflict.

C. No Cause of Action Based on Federal or State Statutory Provisions Has Been Pled, Appealed, or Identified as Conflicting with the Constitution.

Petitioners urge this Court to grant certiorari to resolve the "conflict with federal statutory and Constitutional provisions." *Pet.* at 5. Without citation, Petitioners also refer to "federal legislation" relative to informed consent from parents which is allegedly necessary for a minor to obtain health care. *Pet.* at 5, 11, 15, 16-17. Even if such authority had been offered, no cause of action under this phantom federal legislation was ever pled.

Although the complaint initially included a claim for violation of the Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h, this claim was voluntarily dismissed pursuant to stipulation and order. *Resp., App. B.* Petitioners did not seek appellate review of this federal statutory claim.

Petitioners similarly assert that the District Court's decision conflicts with state law regarding parental consent. *Pet.* at 11, 15, 16-17. Petitioners cite to three Michigan statutory provisions[7] regarding hospital treatment of emotionally disturbed minors, surgery for mental health patients, and the right of parents to obtain medical records of their minor children. *Pet.* at 15. Petitioners have never asserted these statutory provisions as the basis for a cause of action in this case, perhaps because hospital care and surgery are far from commensurate with the work of Mr. Fink, a school guidance counselor.

The constitutional separation of powers requires Congress and the state legislatures to conform their legislation to this Court's view of the Constitution. However, Petitioners confuse this Court's role with those of Congress and the state legislatures and, on the issue of consent for health care treatment of minors, invite this Court to conform its view of the Constitution to federal and state statutes. Because such action results in the "tail wagging the dog," Petitioners' inappropriate invitation should be declined.

D. Respondent Is Entitled to Qualified Immunity.

The District Court found that Petitioners did not state a claim for violation of their constitutional privacy right. This case was summarily dismissed and the issue of qualified immunity raised in Respondent's motion for summary judgment was not

7. Petitioners miscite Section 716 of the Michigan Public Health Code (Mich. Comp. Laws Ann. 333.1716) as M.C.L. 300.1716. *Pet.* at 15.

addressed. Qualified immunity shields public officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984). The test is an objective standard. Resolution of qualified immunity is a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In this case, the District Court noted that it had difficulty "determining Petitioners' actual privacy claims." *Pet., App.* at A-11, n.4. Yet, it is well established that the constitutional right must not be stated in general terms, but must be sufficiently particularized to place potential defendants on notice that their conduct is probably unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The fact that the District Court was unable to ascertain a constitutional claim alone shows that the right asserted by Petitioners was neither "sufficiently particularized" nor "clearly established," such that Respondent would have known his conduct was unlawful. Even if this Court granted certiorari and reversed the rulings of the lower courts, the viability of Respondent's qualified immunity would preclude further discovery or even a trial on the merits. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

II.

THE DECISIONS OF THE LOWER COURTS ARE NOT ERRONEOUS.

Review on certiorari is also inappropriate in this case because the reasons articulated by the District Court for dismissing Petitioners' claim, as affirmed by the Sixth Circuit, are not erroneous.[8] The District Court demonstrated remarkable

8. Denying Petitioners' motion to amend or alter judgment, the District (Cont'd)

clairvoyance in relying, in part, on *Acton v. Vernonia Sch. Dist. 47J*, 796 F. Supp. 1354, 1361 (D. Or. 1992) (upholding random drug testing of student athletes, the court stated, "courts have acknowledged that the public school is a unique setting in which the constraints of the Fourth Amendment are 'relaxed.'") *Pet. App.* at A-8. Last term, this Court upheld that ruling. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995). *See* discussion *supra*.

The cases cited by Petitioners do not suggest a different outcome. The courts below reached the correct result through a careful analysis of case law. The lower courts appropriately rejected Petitioners' invitation to constitutionalize a tort case by creating a new niche in privacy law. Instead, the courts adopted a common sense interpretation of the Constitution which recognized the unique circumstances of this case and the long-standing position of the federal judiciary not to interfere with the operations of the public schools.

A. Tort Allegations Should Not Be Constitutionalized.

This Court is neither an arbiter of state tort law claims nor a regulator of professional licensing matters. Petitioners urge this Court to constitutionalize a tort or licensing matter based on Respondent's alleged refusal "to follow the law regarding proper and informed consent for psychological health care of minors." *Pet.* at 6. Such circumstances do not justify intervention by this Court and are more appropriate for review by a state court or administrative agency.[9]

(Cont'd)
Court found that Petitioners were rearguing positions that the Court rejected or "attempting new arguments that should have been raised earlier." *Pet., App.* at C-3. The District Court, however, found "no clear error in its original Opinion relative to the dismissal of the privacy claim." *Id.*

9. The District Court noted that although no constitutional violation was
(Cont'd)

This Court has previously rejected constitutional claims which would "impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992). *See also Daniels v. Williams*, 474 U.S. 327, 332 (1986) (holding that the Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"); *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (stating that because Section 1983 imposes liability for violations of constitutional rights, not for violations of duties of care arising out of tort law, remedy for the latter type of injury "must be sought in state court under traditional tort-law principles"); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (holding that "traditional common-law remedies are fully adequate to afford due process" even though a student has a liberty interest from bodily restraint and punishment); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States"). This case presents no reason for this Court to depart from these holdings.

B. Federal Courts Should Not Interfere with the Operations of the Public Schools.

Petitioners' case involves an issue which should be addressed at the state and local level, and not by the federal courts. Local control over public schools is one of this Nation's most deeply rooted and cherished traditions. *Milliken v. Bradley*,

---

(Cont'd)

presented, such a finding "does not preclude a holding by a different court that defendants may have committed a common law tort against plaintiffs." *Pet., App.* at A-13, n.7 and A-16, n.13. Petitioners' tort claims (invasion of privacy, intentional infliction of emotional distress, and medical malpractice) were subsequently dismissed by the State Court. *Resp., App. A.*

418 U.S. 717, 741-42 (1974). Because the dispute in this case does not go beyond the constitutional pale, this Court should not interfere with the operations of the public schools.

This Court has long recognized that local school authorities have broad discretion in the management of school affairs. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), this Court reaffirmed that "public education in our Nation is committed to the control of state and local authorities" and that federal courts "do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." In *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507 (1969),[10] this Court noted that it has "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." In *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), this Court recognized that the special nature of the school setting "requires some easing of the restrictions" regarding certain constitutional parameters. Because "[j]udicial interposition in the operation of the public school system of the Nation poses problems requiring care and restraint," *Epperson*, 393 U.S. at 104, this Court should similarly exercise restraint and decline to grant certiorari in a matter which is more appropriately addressed by state and local authorities.

In the present case, the local school authorities responded to Petitioners' concerns. The school superintendent reviewed Petitioners' concerns and formed a committee to develop policy language, for the Board of Education's consideration, regarding counseling roles and the use of supplemental materials. *R.* 162. The superintendent's letter to Petitioners, in part, stated:

> I have explored the concerns you have levied

---

10. Petitioners miscite *Tinker, supra*, as 383 U.S. 503. *Pet.* at 7.

> against Mr. Michael Fink in his dealing with your son, Jason. I have listened to both you and Mr. Fink relative to what was said and understood in your meetings. I must assume that both you and Mr. Fink are sincere and that communication toward developing an understanding did not occur. However, I do not feel that Mr. Fink had any intent other than to assist Jason. Had he felt that he was not supposed to work with Jason, he would not have scheduled the meeting with you in June [1990]. You have indicated that you do not want Mr. Fink to counsel with Jason and Mr. Fink acknowledged your request in writing in June. That was reaffirmed during our meeting in September [1990].

R. 163. Given the responsiveness of local school authorities, it is not appropriate for the federal courts to intervene. It is "not the role of the federal courts to set aside decisions of school administrators [even those] which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

C. The Constitution Should Be Interpreted with Common Sense.

Common sense also dictates that this Court deny certiorari. After all, "[c]ommon sense requires that the Constitution must be interpreted in the light of certain facts, which are inherent in the human condition." *Bahr v. Jenkins*, 539 F. Supp. 483, 487 (E.D. Ky. 1982). Here, the District Court interpreted a student's right to privacy in light of "common sense" considerations which are intrinsic to the operation of public schools. The District Court provided at least three common sense reasons for not requiring

school counselors to receive parental consent before working with students: (1) a child may be having difficulty with his or her parents (or may be a victim of abuse);[11] (2) schools often deal with a student who is a discipline or behavioral problem by sending the student to a counselor; and (3) counselors are often under a statutory obligation not to reveal the confidence of their relationships with students.[12] *Pet., App.* at A-15 to A-16. The District Court concluded that it is not a violation of constitutional privacy to "counsel a student because s/he is 'having trouble socializing' with other students (or is a discipline problem)." *Id.* at 16.

Imposing a "privacy rights" analytical framework on disputes regarding consent in the school setting would create a "Pandora's box" of legal issues for school officials and the courts to consider. Petitioners specifically request that this Court establish a standard "that school officials exercise zealous care that nothing is done which could adversely affect the future relationship of the student with his parents, or his capacity to partake fully of normal developmental stages and learning processes." *Pet.*, at 10. Petitioners have not carefully considered the practical effect or ramifications of the rule that they would have this Court adopt. Would this Court establish a "zealous care" standard? Would this standard differ based on a child's age? If so, on what basis would this Court establish the age differential? Finally, would this standard chill the ability of school officials to

---

11. The District Court acknowledged that the "record reflects no allegations of child abuse." *Pet., App.* at A-15, n.10.

12. The District Court acknowledged that Michigan has not codified a student-counselor privilege, although it has codified a "psychologist/psychiatrist-student" privilege. Mich. Comp. Laws Ann. § 330.1750 (West 1992). However, Michigan statutory law does prohibit a guidance counselor from disclosing confidential student communications in court, except with consent. Mich. Comp. Laws Ann. § 600.2165 (West 1989).

speak to the children under their care? This case plainly speaks volumes about the reasons underlying the federal court's reluctance to intervene in day-to-day school operations.

Petitioners also claim a violation of their privacy right because Mr. Fink "initiated treatment" by reading to Jason from *The Kids' Book of Questions*. *Compl.*, ¶ 26; *Pet.*, at 12. This innocuous book was mentioned in a *Chicago Tribune* article about activities for kids while traveling:

> Put on your thinking cap with "The Kids' Book of Questions" by Gregory Stock. Look for it at the library or a bookstore. (It's $4.95.) It has 260 fun, and sometimes serious, questions — with no right or wrong answers. Here are some examples: "Would you eat a worm sandwich if doing so meant that next week you could appear on your favorite TV show?" or "If you could be invisible for a day, what would you do?" Take turns reading and answering questions.

Candace Purdom, *Road Trip Ahead? Games Bring Boredom to a Screeching Halt*, Chi. Trib., August 3, 1993, § C at 5. A common sense interpretation of the Constitution would not conclude that a teacher violates the Constitution by reading excerpts from this book to a student.

Recognizing the "ever-expanding duties of schoolteachers," this Court has noted that "[t]here is an ongoing relationship, one in which the teacher must occupy many roles — educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature. . . ." *Vernonia*, 115 S. Ct. at 2396 (quoting *Goss v. Lopez*, 419 U.S. 565, 594 (1975) (Powell, J., dissenting) (footnote omitted)). Teachers, counselors, administrators, and

coaches meet with students every day to discuss matters which range from the mundane to matters of life and death. If school officials were subject to constitutional liability in every encounter with a student, these important tasks would be infinitely more complex and so severely defined or regulated as to be unachievable. Respondent submits that the Constitution does not require this result.

CONCLUSION

Because this case presents no issue appropriate for this Court's review, and because the lower courts' holdings were not in error, Petitioners' Writ of Certiorari is unjustified and, therefore, should be denied.

Respectfully submitted,

LISA L. SWEM
Counsel of Record
DONALD J. BONATO
THRUN, MAATSCH & NORDBERG, P.C.
Attorneys for Respondent
501 South Capitol Avenue - Suite 500
Lansing, Michigan 48933
(517) 484-8000

October 11, 1995

APPENDIX A — REFERRAL TO CHILD GUIDANCE CONSULTANT DATED NOVEMBER 3, 1989

REFERRAL TO CHILD GUIDANCE CONSULTANT

Student(s) name(s): *Jason Newkirk*

Person Making Referral: *Jackie Killingsworth*

Date: *11/3/89*

Initial request:

✓ individual student need
___ small group need
___ whole class need
___ peer relationship need
___ teacher consultation
___ other, please specify _____

___ class observation
___ individual observation
___ student request
___ parent consultation

Would you please describe and explain your concern(s) below:

Jason is an angry child. He needs to talk, identify his anger and how to talk about his feelings and concerns.

Jason needs a good friend.

Example: If he has a good day. What made it go well –

If you have a specific request or expectation of me would you also explain below:

Be his friend and be there for him. I don't want (for him) all his eggs in one basket.

APPENDIX B — STIPULATION AND ORDER FILED MARCH 28, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

CASE NO. 1:91-CV-563

RICHARD A. ENSLEN
U.S. DISTRICT JUDGE

JASON NEWKIRK, by Next Friends, DANIEL NEWKIRK and NANCY NEWKIRK and DANIEL NEWKIRK and NANCY NEWKIRK,

Plaintiffs,

v.

EAST LANSING PUBLIC SCHOOLS, DR. WILLIAM MITCHELL, SALLY MCCLINTOCK, JACKIE KILLINGSWORTH, ANN BLOOMQUIST and MICHAEL FINK,

Defendants.

David R. Melton (P38986)
Attorney for Plaintiffs
THE RUTHERFORD INSTITUTE
OF MICHIGAN
4565 Wilson Ave., Ste. 110
Grandville, MI 49418
(616) 538-9300

Appendix B

Richard E. Holmes (P42114)
SMITH, HAUGHEY, RICE & ROEGGE
Attorney for Defendants
East Lansing Public Schools,
Dr. William Mitchell, Sally
McClintock, Jackie Killingsworth,
and Ann Bloomquist
200 Calder Plaza Building
Grand Rapids, MI 49503
(616) 774-8000

Donald J. Bonato (P23244)
Lisa L. Swem (P42051)
THRUN, MAATSCH AND NORDBERG, P.C
Attorneys for Defendant
Michael Fink
501 S. Capitol, Suite 500
P.O. Box 40699
Lansing, MI 48901
(517) 484-8000

STIPULATION AND ORDER FOR DISMISSAL

NOW COME the Plaintiffs Jason Newkirk, by Next Friends Daniel Newkirk and Nancy Newkirk and Daniel Newkirk and Nancy Newkirk, by and through their counsel David R. Melton, and Defendant Michael Fink by and through his counsel Thrun, Maatsch and Nordberg, P.C. to hereby stipulate and agree that the remaining count in the above-captioned cause of action be dismissed as to Defendant Michael Fink, in both his individual and official capacities, with prejudice and without costs to either party.

Appendix B

Dated: 3-21-94

s/ David R. Melton
David R. Melton (P38936)
THE RUTHERFORD INSTITUTE
OF MICHIGAN
Attorney for Plaintiffs

Dated: 3-21-94

s/ Richard E. Holmes
Richard E. Holmes (P38936)
SMITH, HAUGHEY, RICE & ROEGGE
Attorney for Defendants
East Lansing Public Schools,
Dr. William Mitchell, Sally
McClintock, Jackie Killingsworth,
and Ann Bloomquist

Dated: 3-21-94

s/ Lisa L. Swem
Lisa L. Swem (P42051)
Donald J. Bonato (P23244)
THRUN, MAATSCH AND NORDBERG, P.C.
Attorneys for Defendant
Michael Fink

Appendix B

ORDER

At a session of said Court, held in the City of Kalamazoo, State of Michigan, on this the 28th day of March, 1994.

PRESENT: HONORABLE RICHARD A. ENSLEN

IT IS SO ORDERED.

s/ Richard A. Enslen
Hon. Richard A. Enslen

APPENDIX C — FINAL JUDGMENT AND ORDER DATED DECEMBER 13, 1994

STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT

CASE NO. 92-72034-AZ

HON. CAROLYN STELL
CIRCUIT COURT JUDGE

JASON NEWKIRK, by Next Friends, DANIEL NEWKIRK and NANCY NEWKIRK and DANIEL NEWKIRK and NANCY NEWKIRK

Plaintiffs,

v.

MICHAEL FINK,

Defendant.

David R. Melton (P38986)
Attorney for Plaintiffs
THE RUTHERFORD INSTITUTE OF MICHIGAN
4565 Wilson Ave., Ste. 110
Grandville, MI 49418
(616) 538-9300

Donald J. Bonato (P23244)
Lisa L. Swem (P42051)
THRUN, MAATSCH AND NORDBERG, P. C.
Attorneys for Defendant Michael Fink
501 S. Capitol, Suite 500
P. O. Box 40699
Lansing, MI 48901
(517) 484-8000

Appendix C

FINAL JUDGMENT AND ORDER GRANTING DEFENDANT FINK'S MOTION FOR SUMMARY DISPOSITION

FINAL JUDGMENT AND ORDER

At a session of said Court held in the Circuit Court for the County of Ingham, State of Michigan, on the 13th day of December, 1994.

PRESENT: HONORABLE CAROLYN STELL, CIRCUIT COURT JUDGE

At a hearing held November 30, 1994, on Defendant Fink's Motion for Summary Disposition, the parties having briefed the Motion, the Court having been fully advised on the premises, and the Court having issued its opinion from the bench,

IT IS NOW THEREFORE ORDERED for the reasons stated by the Court on the record, that Defendant Fink's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is granted as to Count III (intentional infliction of emotional distress) of Plaintiffs' Amended Complaint.

In that the Court previously granted Defendant Fink's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) as to Counts I (constitutional privacy), II (tortious invasion of privacy) and IV (medical malpractice), this Order constitutes final judgment of this action and Plaintiffs' Amended Complaint is dismissed in its entirety with prejudice.

IT IS SO ORDERED.

Appendix C

s/ Carolyn Stell
CAROLYN STELL, Circuit Judge

Countersigned:
s/ LOLA WILLIAMS
Deputy Clerk

Prepared by:
Lisa L. Swem (P42051)
THRUN, MAATSCH & NORDBERG, P. C.
Attorney for Defendant Fink

Approved as to Form:
s/ David R. Melton
David R. Melton (P8986)
THE RUTHERFORD INSTITUTE
Attorney for Plaintiffs

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although Petitioners cite only to the Ninth and Fourteenth Amendments in their Petition, Count I of Petitioners' complaint alleges that Respondent, along with others:

> [D]eprived [Petitioners] of their rights under Article I, Section 9, Clause 3 and the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, in violation of 42 U.S.C. §§ 1983 and 1988, rendering [him] liable to the [Petitioners].

Compl. at ¶ 47. Those constitutional and statutory provisions are set forth below.

Constitutional Provisions

U.S. Const. art I, § 9, cl. 3.

> No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix D

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. IX.

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Appendix D

U.S. Const. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provision

42 U.S.C. § 1983.

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution an laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.